**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 29 August 2006**

In the Matter of
Mr. J. L. J., Jr.[1]
Claimant

Case No.: 2005 BLA 5303

v.

FRONTIER-KEMPER CONSTRUCTORS, INC.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Appearances: Mr. James D. Holliday, Attorney
For the Claimant

Ms. Mary Lou Smith, Attorney
For the Employer

Ms. Francine A. Serafin, Attorney
For the Director

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –**
**DENIAL OF BENEFITS**

This matter involves a claim filed by Mr. J. L. J. for disability benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"), as implemented by 20 C.F.R. Parts 718 and 725. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

[1]Despite 20 C.F.R. § 725.477(b) ("A decision and order shall contain . . . the names of the parties. . . ."), and over my specific objection, Chief Administrative Law Judge John Vittone has directed that I substitute initials for the names of the Claimant and all family members. Any comments or concerns regarding this mandated practice should be directed to Chief Administrative Law Judge John Vittone, 800 K Street, Suite 400N, Washington, D.C. 20001.

## Procedural Background

On August 11, 2003, Mr. J. applied for federal black lung disability benefits (DX 1).[2] On August 17, 2004, the District Director determined Mr. J. was entitled to black lung disability benefits and designated Frontier-Kemper Constructors, Inc. ("Frontier-Kemper") as the responsible operator (DX 32). On September 10, 2004, through counsel, the Employer appealed the award of benefits (DX 34). Due to the Employer's appeal, the District Director awarded interim benefits on October 18, 2004 (DX 37) and forwarded the case to the Office of Administrative Law Judges on October 25, 2004 (DX 39). After one continuance and pursuant to a Notice of Hearing, dated April 13, 2005, (ALJ I), I conducted a hearing in Abingdon, Virginia on July 26, 2005 with Mr. J., Mr. Holliday, and Ms. Smith present.

## Evidentiary Discussion

At the hearing, I admitted into evidence Dr. Cappiello's essentially negative (profusion 0/1) interpretation of a July 11, 2003 chest x-ray, DX 13, offered by the Employer as a treatment record under 20 C.F.R. § 725.414(a)(4) because the interpretation had been obtained from a physician identified by the claimant prior to the hearing as a treating physician. I also admitted Dr. Alexander's positive interpretation of the same film, CX 1, as rebuttal evidence under 20 C.F.R. § 725.414 (a)(2)(ii). However, upon my present review of Mr. J.'s hearing testimony, I believe the basis for admission of both interpretations needs to be corrected.

Mr. J. testified that in preparation for filing a silicosis disability claim, he went to Dr. Cardona to obtain a chest x-ray. Dr. Cardona then apparently referred Mr. J. to Dr. Cappiello who provided the July 11, 2003 chest x-ray interpretation. According to Mr. J., he only saw Dr. Cardona that one time and the physician did not provide any treatment. As a result, I now conclude that Dr. Cappiello's negative interpretation of the July 11, 2003 chest x-ray, part of DX 13, is not admissible under 20 C.F.R. § 725.414 (a) as a medical treatment record. Correspondingly, upon the exclusion of Dr. Cappiello's interpretation, the stated basis for the admission of Dr. Alexander's positive interpretation of the July 11, 2003 chest x-ray, CX 1, as rebuttal to Dr. Cappiello's interpretation also falls away.[3]

However, rather than simply exclude these two interpretations, I find both studies remain admissible, albeit on a different basis. Dr. Alexander's positive interpretation, CX 1, is admissible as a case-in-chief chest x-ray interpretation under 20 C.F.R. § 725.414 (a) (2) (i). Although Mr. J. already identified two other interpretations for his two permissible case-in-chief x-ray interpretations, one of the films, Dr. Forehand's positive reading of the September 25, 2003

[2]The following notations appear in this decision to identify exhibits: DX – Director exhibit; CX – Claimant exhibit; EX – Employer exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

[3]Since the hearing, the Benefits Review Board has also removed this basis for the admission of evidence by concluding that rebuttal of treatment records and associated studies is not permitted under the regulatory restrictions. Specifically, in *Henley v. Cowin & Co.* BBR No. 05-0788 (May 30, 2006) (unpub.), the Board held that the provisions of 20 C.F.R. § 725.414 do not allow for the rebuttal of treatment records As a result, the Benefits Review Board vacated the administrative law judge's ruling that permitted an employer to submit a rebuttal interpretation of a chest x-ray reading contained in the miner's treatment records.

chest x-ray, DX 22, was part of the DOL-sponsored pulmonary examination and is not considered to be part of a claimant's case-in-chief evidence.[4] In other words, since Dr. Forehand's reading does not count as a case-in-chief x-ray, Dr. Alexander's reading of the July 11, 2003 film may be admitted as the second case-in-chief x-ray for the Claimant.

Correspondingly, because Dr. Alexander's positive finding is now a case-in-chief chest x-ray submitted by the Claimant, Dr. Capiello's negative interpretation, DX 14, becomes admissible as a rebuttal chest x-ray interpretation under 20 C.F.R. § 725.414 (a) (3) (ii).[5]

Accordingly, based on my evidentiary determinations, my decision in this case is based on CX 1 to CX 4, EX 1 to EX 4, DX 1 to DX 41, and the hearing testimony.[6]

## ISSUES

1. Responsible Operator

2. Whether Mr. J. has pneumoconiosis.

3. If Mr. J. has pneumoconiosis, whether his disease arose out of coal mine employment.

4. Whether Mr. J. suffers a totally disabling pulmonary impairment.

5. If Mr. J. is impaired, whether his total disability is due to coal workers' pneumoconiosis.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Preliminary Findings

Born on September 5, 1955, Mr. J. married Ms. B. S. A. on March 31, 1978. In 1974, Mr. J. started working in coal mine shaft construction. About 1980, he turned to coal mining and worked steadily through 1985. After being out of work for about a year, Mr. J. periodically worked in various coal mines for the next few years. In 1989, Mr. J. began working for Frontier-Kemper as a mucker[7] operator during the construction of ventilation shafts for coal mines.

---

[4]20 C.F.R. § 725.406 (b).

[5]*See Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-____, BRB No. 05-0595 BLA (Mar. 28, 2006) (each party is entitled to submit one x-ray interpretation for each x-ray interpretation offered by the opposing party). Unless of course, the interpretation is part of a treatment record. *See* footnote 3.

[6]At the hearing, I deferred a decision on whether the testimony of Mr. Pond and Mr. Brock would be admissible. For the reasons discussed subsequently under Issue #1, I have now admitted Mr. Pond's hearing testimony and excluded Mr. Brock's testimony.

[7]Muck is "generic term meaning broken material, broken either by blasting, which is the more common case, or by breaking it with some kind of device." Mr. Robert A. Pond (TR, page 79).

Though most of the operation of the mucker involved moving control levels, Mr. J. had to occasionally engage in heavy labor by lifting and carrying a 75 pound hook that attached to the buckets which removed the muck from the shaft. He also occasionally lifted mine equipment such as drill steel pumps and jack hammers, weighing up to 75 pounds. Over the next thirteen years, Mr. J. worked on at least 10 construction projects for Frontier-Kemper. During breaks between projects, Mr. J. worked in various local coal mines. In his last two projects with Frontier-Kemper, Mr. J. was a "walker" or working foreman. In that capacity, he supervised a work crew of 8 to 10 men and engaged in all types of work, including the operation of the mucker. After injuring his back at work picking up a pump in October 2002, Mr. J. was laid off by Frontier-Kemper in January 2003 and has not returned to work. The location of his last project with Frontier-Kemper was Perry County, Hazard, Kentucky.[8] Mr. J. smoked cigarettes from about 1975 to the early 1980s at the rate of a pack per day. (DX 2, DX, 3, DX 4, DX 8, and TR, pages 35 to 75).

**Issue #1 – Responsible Operator**

The Employer has contested its designation as the potentially liable responsible operator in this case. In response, the Director has asserted: a) the Employer was procedurally precluded from presenting evidence at the July 26, 2005 hearing concerning the responsible operator issue, and; b) the Frontier-Kemper is the correctly named responsible operator in this case.[9]

Procedural Evidentiary Exclusion

Relying on the provisions of 20 C.F.R. §§ 725.408 (b), 414 (c), and 414 (d), and absent a finding of extraordinary circumstances, the Director asserts Frontier-Kemper was precluded from presenting any witnesses or documentary evidence at the July 26, 2005 hearing regarding its designation as the responsible operator. According to counsel for the Director, the hearing evidentiary exclusion is warranted for two reasons. First, "The company has failed to timely submit any evidence to support its position that it is not the properly named responsible operator." Second, Frontier-Kemper "did not notify the District Director of any potential witness whose testimony pertained to the liability of the potentially liable operator or the designated responsible operator."

In direct contradiction, the Employer maintains that it provided documentation concerning its responsible operator designation to the District Director in a timely manner. Likewise, a potential witness concerning its liability was timely identified to the District Director.

At the July 26, 2005 hearing, although I permitted evidence to be presented on the responsible operator issue, I deferred a decision on the admissibility of such evidence until my

[8]Since Mr. J. last worked in Kentucky, his case falls within the jurisdiction of the U.S. Court of the Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP,* 12 B.L.R. 1-200, 1-202 (1989) (en banc).

[9]Although a representative for the Director did not attend the July 26, 2005 hearing, counsel for the Director presented these two assertions in a pre-hearing correspondence, dated July 13, 2005.

adjudication of the case (TR, page 9). To address this issue, a review of the procedural history of this case is particularly helpful.

*Procedural History*

Following Mr. J.'s application for black lung disability benefits, a claims examiner for the U.S. Department of Labor ("DOL"), notified Frontier-Kemper on September 9, 2003 of Mr. J.'s claim and the company's designation as a potentially liable responsible operator (DX 18).

On October 9, 2003, through counsel, Frontier-Kemper acknowledged the claim and preserved all issues associated with the responsible operator designation (DX 21). On October 29, 2003, in response to DOL's insurance inquiry, Frontier-Kemper informed DOL that it was an independent construction company and not a coal mine operator subject to the Act's insurance requirements (DX 22). In the same correspondence, Frontier-Kemper indicated that Mr. J. had intermittent employment from June 26, 1989 to October 18, 2002. The company asserted that during that employment, most of his work did not involve exposure to coal dust generated in the extraction or preparation of coal.

On December 2, 2003, in support of its request to be dismissed as a potentially liable responsible operator because the company did not employ Mr. J. as a "miner" under the Act, Frontier-Kemper provided the November 26, 2003 affidavit of Mr. Robert A. Pond, Executive Vice President, who discussed Mr. J.'s involvement in ten construction projects associated with coal mines and his cumulative exposure to coal dust (DX 23). Mr. Pond also attached an exhibit providing specific details about each of the ten projects.

On March 10, 2004, DOL issued a Schedule for Additional Evidence, indicating preliminary determinations that: a) Mr. J. would be entitled to black lung disability benefits; and, b) Frontier-Kemper was the properly designated responsible operator (DX 24). The notice cited the rebuttal presumption that a coal mine construction worker is exposed to coal mine dust and indicated, "the presumption has been sufficiently rebutted."

On April 6, 2004, the Employer objected the preliminary determinations including Mr. J.'s entitlement to benefits, his length of coal mine employment, and its designation as the responsible operator (DX 26). The company asserted that Mr. J.'s cumulative exposure to coal mine dust had been less than one year while working for Frontier-Kemper. Additionally, since the exposure presumption had been rebutted, the company questioned its continuing designation. Frontier-Kemper also objected to DOL's assertion that it could provide no further evidence regarding its designation. The company again designated Mr. Pond as its potential hearing witness and presented his affidavit and attachment. At the same time, the company indicated that it could not predict who would be actually available to testify at the time of the hearing.

On May 14, 2004, DOL informed Frontier-Kemper that the earlier presumption rebuttal finding should not have been made. DOL again asserted that Mr. J. met the definition of miner under the Act.

*Discussion*

According to 20 C.F.R. § 725.408 (a) (1), upon notification of a black lung claim and possible liability, a potential operator must file a response within 30 days indicating its intent to accept or contest its identification as a potentially liable responsible operator. Then, under 20 C.F.R. § 725.408 (b) (1), a potential operator has 90 days to submit documentation to support its objection to responsible operator designation on one or more five specific grounds set out in 20 C.F.R. § 725.408 (a) (2). One of those grounds of contention, 20 C.F.R. § 725.408 (a) (2) (iii), is whether the miner was exposed to coal mine dust while working for the potential operator. Under the evidentiary limitation imposed by 20 C.F.R. § 725.408 (b) (2), failure to provide that documentation within the prescribed time limit precludes its admission in any further proceeding.

Similarly, 20 C.F.R. § 725.414 (c) requires that a potential responsible operator notify the district director of the name of "any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." If such notice is not provided, and in the absence of extraordinary circumstances causing the lack of notice, "the testimony of a witness relevant to the liability of . . . the designated responsible operator shall not be admitted in any hearing. . . ."

As set out in the procedural history, within 30 days of his receipt of notice of responsible operator designation, Frontier-Kemper informed DOL that it was preserving, and thus effectively contesting, all issues related to responsible operator status. Then, less than 90 days from notification, Frontier-Kemper provided Mr. Pond's affidavit and attachment which disputed the Employer's designation as the responsible operator on the grounds that Mr. J. was not exposed to significant about of coal mine dust during his employment with the company. Thus, in light of that procedural history, I find Frontier-Kemper was not precluded from presenting Mr. Pond's affidavit and attachment, DX 23 and DX 26, as evidence at the July 26, 2005 hearing.

In regards to witnesses, when providing Mr. Pond's affidavit to DOL in response to the preliminary findings, Frontier-Kemper both implicitly and explicitly identified Mr. Pond as a possible hearing witness on the issue of responsible operator. Accordingly, Mr. Pond's hearing testimony was admissible.

On the other hand, while the case was before the District Director, Frontier-Kemper did not also identify Mr. Delone Brock as another potential witness on the responsible operator issue as required by 20 C.F.R. § 725.414 (c). Although Frontier-Kemper indicated to the District Director that it could not predict who would be available at the time of the hearing, I consider that response an insufficient basis to warrant waiver of the pre-hearing witness identification requirement on the grounds of "extraordinary circumstances" for two reasons. First, had Mr. Pond been unable to testify at the time of the hearing, then a witness substitution to enable the company to present at least one knowledgeable witness on the responsible operator issue may have been warranted. However, Mr. Pond was available and testified.

Second, at the hearing, Mr. Brock indicated that he had worked for Frontier-Kemper for numerous years as a construction manager and had been at many of the job sites where Mr. J.

worked. Based on the employment relationship, Frontier-Kemper had ample knowledge that Mr. Brock may have relevant information to present on the issue of responsible operator. Nothing in the record supports a finding that Frontier-Kemper was prevented from timely identifying Mr. Brock to the District Director as a second witness as required by 20 C.F.R. § 825.414 (c). Accordingly, under the exclusion mandate imposed by 20 C.F.R. § 725.414 (c), I conclude Mr. Brock's hearing testimony was not admissible.

Responsible Operator Designation

Frontier-Kemper requests that it be dismissed as the designated responsible operator in this case because Mr. J. was not a "miner" within the meaning of the Act and regulations.

*Evidence*

Mr. Robert A. Pond
(DX 23, DX 26, and TR, pages 75 to 85)

In a November 26, 2003 affidavit, Mr. Pond, an executive vice president of Frontier-Kemper, indicated that the Employer was an independent contractor who, among many projects, constructed tunnels and shafts for companies that were either developing or operating coal mines. Once a construction project was complete, Frontier-Kemper left the work site and had no on-going presence. Frontier-Kemper did not own or operate any coal mines and was not in the business of extracting or preparing coal. Additionally, when constructing a shaft for a coal mine, if Frontier-Kemper went through a coal seam, "no attempt is made to separate the coal from the broken rock or other spoil being removed, collectively called 'muck.'" The owner of the mine would determine what happened to the extracted material. Generally, most owners did not find the coal in the extracted material to have any commercial value. Further, when a shaft is being constructed at a location where no mining has been conducted, the Frontier-Kemper workers have no exposure to dust generated by coal mine operations. At an operating mine location, the shaft is not part of the active mine until it reaches the commercial coal seam and a connection is made to the operating coal mine. At that connection, Frontier-Kemper's work is essentially completed.

Over the course of his employment with Frontier-Kemper, Mr. J. worked on 10 different projects related to coal mines. Based on the specifics associated with each of the 10 projects, related to depth/length of the shaft/slope, the nature of the construction (one project involved excavation of rock to create a storage bunker) and the thickness of the intervening coal seams, ranging from either 7 to 16 feet or 4% to 10% the length of the shaft/slope, Mr. Pond estimates that Mr. J. had a total of no more than 34 days of possible exposure to coal mine dust. Significantly, on the last two projects, Mr. J. was a "walker," or crew supervisor, which further reduced his exposure to dust.

At the July 26, 2005 hearing, Mr. Pond testified that the muck associated with the construction of a shaft consists of debris from whatever geologic formations the shaft goes through, including sandstone shell, limestone, and coal. The coal comes from "very thin" coal seams encountered during the construction. The construction of a shaft begins with the removal

of the top soil. Then a head frame is placed on the worksite with a hoist and the rock is drilled and blasted to a depth of about 12 feet. The broken rock, or muck, is then removed, loaded in buckets and taken to a surface dump. Then, a steel form is lowered into the hole and concrete is poured between the frame and rock. Finally, the shaft is deepened below the concrete through a repeat of the same process. In estimating the amount of Mr. J.'s exposure to coal dust during his employment with Frontier-Kemper, Mr. Pond determined the length of the shafts for each of the ten projects, determined the amount of coal in the intervening thin seams, calculated the speed at which the shaft was constructed, and estimated the approximate amount of time the company was drilling through the coal seams. Mr. Pond agreed that part of a walker's duties included pitching in to "help with work also as it may be needed."

Affidavit Attachment
(DX 23 and DX 26)

With his November 26, 2003 affidavit, Mr. Pond attached a summary of Mr. J.'s work history and provided the following specific information for the 10 projects.

1. From June 26, 1989 to June 27, 1990, Mr. J. worked as a miner/mucker operator during the construction of a 1,620 vertical foot ("vf") shaft for Consolidation Coal Company. Mr. Pond estimated Mr. J.'s cumulative exposure to coal mine dust was 3 days.

2. From December 26, 1990 to January 16, 1991, Mr. J. was a miner/driller for a 1,707 vf shaft for Island Creek Coal Company. Mr. J.'s coal mine dust exposure was less than one day.

3. During the following periods: June 11, 1993,[10] December 20, 1993 to January 21, 1994, and March 7, 1994 to March 31, 1994, Mr. J. was a scoop/mucker operator during the construction of three slope shafts for Eastern Associated Coal Company. Mr. J.'s coal mine dust exposure was 6 days.

4. From July 12, 1994 to August 4, 1995, Mr. J. was a mucker on a 1,300 vf shaft construction project for Consolidation Coal Company. Mr. J. was exposed to coal mine dust for a total of 5 days.

5. During the construction of a coal bunker for Consolidation Coal Company from July 11, 1996 to March 27, 1997, Mr. J. was not exposed to coal dust while working as a mucker operator.

6. From March 27, 1997 to August 8, 1997, Mr. J. worked as a mucker operator when Frontier-Kemper constructed a vertical shaft and a slope shaft for Arclar Company. His exposure to coal mine dust was 4 days.

[10]The summary states "6/11/03." Based on the chronological order of the summary and the other dates associated with this project, I believe the "03" is a typographical error.

7. Between February 18, 1998 and November 19, 1998, Mr. J. operated a mucker during the construction of a 1,382 vf shaft for Consolidation Coal Company. Mr. J.'s coal mine dust exposure was 2 days.

8. From May 24, 1999 to October 29, 2000, Mr. J. was exposed to coal mine dust for 4 days as mucker operator during the construction of a 1,743 vf shaft for Consolidation Coal Company.

9. Between October 29, 2000 and May 10, 2002, Mr. J. worked as a walker during the construction of a 1,840 vf shaft for Consolidation Coal Company. His exposure to coal mine dust was 4 days.

10. During the construction of two vertical shafts and two slope shafts for Perry County Coal Company from June 26, 2002 to October 18, 2002, Mr. J. was exposed to coal mine dust a total of 5 days.

Mr. J.
(TR, pages 35 to 75)

Over the course of thirteen years, as set out in Mr. Pond's attachment, Mr. J. worked on ten construction projects for Frontier-Kemper, digging ventilation shafts and a storage bunker for various coal mines. His work as a mucker operator varied depending stage of the construction which went through four cycles: drilling, "rolling" and shooting (blasting), removing muck, and "pulling cement." During construction, Mr. J. was exposed to rock and coal dust as he operated the mucker to remove the rock from the work stage area and load the debris in a bucket which hauled the muck to the surface. Typically, in constructing the shaft, they would go through several coal seams, ranging in depth from a few inches to several feet.

*Discussion*

Under 20 C.F.R. § 725.202 (b), a coal mine construction worker is considered a miner for the purposes of the Act to the extent: "such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine" and "his or her work is integral to the building of a coal or underground mine."[11] For the purpose of identifying a responsible operator,[12] 20 C.F.R. § 725.202 (b) (1) (iii) establishes a rebuttable presumption that the claimant was exposed to coal mine dust "during all periods" of his employment in and around a coal mine. That presumption may be rebutted under 20 C.F.R. § 725.202 (b) (2) if the individual: (i) was not regularly exposed to coal mine dust during his work; or, (ii) did not regularly work in or around a coal mine.

[11]The definition of coal mine includes shafts, slopes, and excavations used in, or to be used in, the extraction of coal. 20 C.F.R. § 725.101 (12).

[12]The term "operator" includes any owner who operates a coal mine or "any independent contractor performing construction at such mine." 20 C.F.R. § 725.491 (a) (1).

In the case before me, Mr. J. engaged in the construction of shafts, slopes, and a coal bunker, which are included in the definition of coal mine. Nevertheless, Frontier-Kemper contests its designation as the responsible operator on the basis that Mr. J. was not a miner because he was not regularly exposed to coal mine dust during the ten construction projects. Mr. J.'s testimony demonstrates that he was regularly exposed to dust during his work. However, Mr. Pond has also reasonably calculated that during Mr. J.'s cumulative employment of over six years, his estimated total exposure to coal dust was about 34 days. Consequently, based on Mr. Pond's credible testimony, the presumption under 20 C.F.R. § 725.202 (b) (1) that Mr. J. was regularly exposed to coal mine dust during his employment with Frontier-Kemper may be rebutted if "coal mine dust" in the regulation refers solely to dust from coal.[13]

Given the long history of the Act, this definition issue has previously arisen and a significant difference of opinion has developed. According to the court in *Budger Coal Co. v. Director, OWCP,* 927 F.2d 1150 (10th Cir. 1996), concluded that "coal mine dust" does not include exposure to mine dust that does not contain coal. Similarly, in *William Brothers, Inc. v. Pate*, 833 F.2d 261 (11th Cir. 1987), the court determined that "coal mine dust" only includes dust actually generated by the extraction and preparation of essentially commercial coal.

However, in *Garrett v. Cowin & Co., Inc.,* 16 BLR 1-77 (1990), the Benefits Review Board ("BRB" and "Board") took a much broader view by finding that "coal mine dust" encompasses all environmental dust in a coal mine. In *Garrett,* the employer asserted that since the claimant engaged in the construction of new coal mines, he was not regularly exposed to coal dust produced by the production and extraction of coal. In rejecting the employer's position, the Board indicated the definition of coal mine dust was not limited to dust produced in the extraction of coal. The term "coal mine dust" also included "dust which arises from other activities, such as coal mine construction." *Id.* at 1-80.

In determining which approach to apply in Mr. J.'s case, I am guided by three considerations. First, as previously noted, Mr. J. last worked as a coal mine construction worker in Kentucky. Consequently, his case does not fall within the jurisdiction of either court of appeals mentioned above. As a result, in the absence of any definitive decision on the issue by the U.S. Court of Appeals for the Sixth Circuit, the BRB's holding in *Garrett* is the applicable precedent and controls the meaning of "coal mine dust." Second, the regulation uses the phrase "coal mine dust" rather than "coal dust" in the provisions of 20 C.F.R. §§ 725.101 (a) (19) in defining "miner" and 725.202 in addressing exposure of coal mine construction workers. In publishing the new regulations, DOL commented that the use of "coal mine dust" was consistent with DOL's long held position that the occupational dust exposure covered by the Act was the "total exposure arising from coal mining, and not only exposure to coal dust itself." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,958 (Dec. 20, 2000). Third, a more expansive meaning of "coal mine dust" is consistent with the

[13]In his inadmissible testimony (TR, pages 85 to 102), Mr. Delone Brock indicated that he had been present at many of the project sites as a manager and did not observe much dust in the work area because the company kept the work area and muck wet. In his opinion, "we basically did not have any dust." Had Mr. Brock's testimony been admissible, I would nevertheless find that Mr. J. had been regularly exposed to occupational dust. The credible testimony of Mr. J. coupled with the credible testimony by Mr. Pond represents the preponderance of the testimonial evidence, outweighs Mr. Brock's contrary testimony, and demonstrates the Mr. J. was exposed to dust during his work in coal mine construction.

regulatory definition of clinical pneumoconiosis in 20 C.F.R. § 718.201 (a) (1) which includes in addition to coal workers' pneumoconiosis and anthracosis, among others, silicosis and silicotuberculosis.

Applying the broad definition of "coal mine dust," applicable to this case under *Garrett,* I find insufficient evidence to rebut the presumption under 20 C.F.R. § 725.202 (b) (2) that Mr. J. was regularly exposed to coal mine dust during his long employment with Frontier-Kemper. As a result, Mr. J. was a miner within the meaning of the regulations while employed by Frontier-Kemper in coal mine construction. Accordingly, Frontier-Kemper is properly designated as the potentially liable responsible operator in this case and its request to be dismissed should be denied.

**Issue #2 – Presence of Pneumoconiosis**

To receive black lung disability benefits under the Act, a claimant must prove four basic conditions, or elements, related to his physical condition. First, the miner must establish the presence of pneumoconiosis.[14] Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miners' pneumoconiosis arose, at least in part, out of coal mine employment.[15] Third, the miner has to demonstrate he is totally disabled.[16] And fourth, the miner must prove the total disability is due to pneumoconiosis.[17]

Pneumoconiosis

"Pneumoconiosis" is defined as a chronic dust disease arising out of coal mine employment.[18] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as "any chronic lung disease. . .arising out of coal mine employment."[19] The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201 (b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

According to 20 C.F.R. § 718.202, the existence of pneumoconiosis may be established by four methods: chest x-rays (§ 718.202 (a)(1)), autopsy or biopsy report (§ 718.202 (a)(2)),

[14]20 C.F.R. § 718.202.

[15]20 C.F.R. § 718.203 (a).

[16]20 C.F.R. § 718.204 (b).

[17]20 C.F.R. § 718.204 (a).

[18]20 C.F.R. § 718.201 (a).

[19]20 C.F.R. § 718.201 (a) (1) and (2) (emphasis added).

regulatory presumption (§ 718.202 (a)(3)),[20] and medical opinion (§ 718.202 (a)(4)). Since the record does not contain any evidence that Mr. J. has complicated pneumoconiosis, and he filed his claim after January 1, 1982, a regulatory presumption of pneumoconiosis is not applicable. Additionally, Mr. J. has not submitted a biopsy. As a result, Mr. J. will have to rely on chest x-rays or medical opinion to establish the presence of pneumoconiosis.

*Chest X-rays*

| **Date of x-ray** | **Exhibit** | **Physician** | **Interpretation** |
|---|---|---|---|
| October 17, 2002 | DX 13 | Dr. Antoun | (Negative for pneumoconiosis) Radiographically normal chest. |
| July 11, 2003 | CX 1 | Dr. Alexander, BCR, B[21] | Positive for pneumoconiosis, profusion category 1/0,[22] type p opacities.[23] |
| (same) | DX 13 | Dr. Cappiello, BCR, B[24] | (Negative for pneumoconiosis), profusion category 0/1, type p opacities. |
| September 25, 2003 | DX 22 | Dr. Forehand, B | Positive for pneumoconiosis, profusion category 1/0, type s/t opacities. |

[20]If any of the following presumptions are applicable, then under 20 C.F.R. § 718.202 (a)(3), a miner is presumed to have suffered from pneumoconiosis: 20 C.F.R. § 718.304 (if complicated pneumoconiosis is present, then there is an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis); 20 C.F.R. § 718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and 20 C.F.R. § 718.306 (a presumption when a survivor files a claim prior to June 30, 1982).

[21]The following designations apply: B – B reader, and BCR – Board Certified Radiologist. These designations indicate qualifications a person may possess to interpret x-ray film. A "B Reader" has demonstrated proficiency in assessing and classifying chest x-ray evidence for pneumoconiosis by successful completion of an examination. A "Board Certified Radiologist" has been certified, after four years of study and examination, as proficient in interpreting x-ray films of all kinds including images of the lungs.

[22]The profusion (quantity) of the opacities (opaque spots) throughout the lungs is measured by four categories: 0 = small opacities are absent or so few they do not reach category 1; 1 = small opacities definitely present but few in number; 2 = small opacities numerous but normal lung markings are still visible; and, 3 = small opacities very numerous and normal lung markings are usually partly or totally obscured. An interpretation of category 1, 2, or 3 means there are opacities in the lung which may be used as evidence of pneumoconiosis. If the interpretation is 0, then the assessment is not evidence of pneumoconiosis. A physician will usually list the interpretation with two digits. The first digit is the final assessment; the second digit represents the category that the doctor also seriously considered. For example, a reading of 1/2 means the doctor's final determination is category 1 opacities but he considered placing the interpretation in category 2. Or, a reading of 0/0 means the doctor found no, or few, opacities and didn't see any marks that would cause him or her to seriously consider category 1. According to 20 C.F.R. § 718.102 (b), a profusion of 0/1 does not constitute evidence of pneumoconiosis.

[23]There are two general categories of small opacities defined by their shape: rounded and irregular. Within those categories the opacities are further defined by size. The round opacities are: type p (less than 1.5 millimeter (mm) in diameter), type q (1.5 to 3.0 mm), and type r (3.0 to 10.0 mm). The irregular opacities are: type s (less than 1.5 mm), type t (1.5 to 3.0 mm) and type u (3.0 to 10.0 mm). JOHN CRAFTON & ANDREW DOUGLAS, RESPIRATORY DISEASES 581 (3d ed. 1981).

[24]As I advised the parties at the hearing (TR, page 6), I take judicial notice of Dr. Cappiello's board certification and have attached the certification documentation. I also take judicial notice that Dr. Cappiello is a B reader. See B-Reader list in the Black Lung Reference section at www.oalj.dol.gov.

| | | | |
|---|---|---|---|
| (same) | CX 3 | Dr. Alexander, BCR, B | Positive for pneumoconiosis, profusion category 1/0, type p opacities. |
| (same) | EX 3 & EX 4 | Dr. Scott, BCR, B | Negative for pneumoconiosis; possible emphysema. |
| (same) | DX 13 | Dr. Wheeler, BCR, B | Negative for pneumoconiosis. |
| March 23, 2005 | EX 1 | Dr. Castle, B | Negative for pneumoconiosis. |
| (same) | CX 4 | Dr. Alexander, BCR, B | Positive for pneumoconiosis, profusion category 1/0, type p opacities. |

Based on Dr. Antoun's sole, and uncontested interpretation, I find the October 17, 2002 chest x-ray is negative for pneumoconiosis.

In the July 11, 2003 radiographic film, Dr. Alexander, a dual qualified radiologist, found sufficient profusion to support a finding that the film was positive for pneumoconiosis. However, Dr. Cappiello, also a dual qualified radiologist, found insufficient profusion to support a positive finding, which effectively makes his interpretation negative for pneumoconiosis under the regulations. Their professional standoff concerning the extent of the profusion renders the July 11, 2003 chest x-ray inconclusive for the presence of pneumoconiosis.

The September 25, 2003 chest x-ray generated a dispute among the four physicians who evaluated the film. Dr. Forehand, a B reader, and Dr. Alexander, a dual qualified radiologist, found sufficient evidence of pneumoconiosis. Dr. Scott and Dr. Wheeler, both dual qualified radiologists, concluded the chest x-ray was negative. Since assessments of the dual qualified radiologists have greater probative value[25] and two of the three radiologists found insufficient evidence of pneumoconiosis, I find the September 25, 2003 chest x-ray is negative for black lung.

Finally, in the March 23, 2005 chest x-ray, Dr. Alexander, a dual qualified radiologist, observed pneumoconiosis. Dr. Castle, a B reader, did not. Based on Dr. Alexander's superior credentials, I give his interpretation greater probative weight. As a result, I find the March 23, 2005 chest x-ray is positive for pneumoconiosis.

Over the three year course of the radiographic record in this case, which I find to be sufficiently contemporaneous, one film is inconclusive (July 11, 2003), one chest x-ray is positive for pneumoconiosis (March 23, 2005), and two radiographic studies are negative for pneumoconiosis (October 17, 2002 and September 25, 2003). Consequently, the preponderance of the chest x-ray evidence is negative for pneumoconiosis and Mr. J. is unable to prove the presence of pneumoconiosis through chest x-rays under 20 C.F.R. § 718.202 (a) (1).

[25]*See Zeigler Coal Co. v. Director [Hawker]*, 326 F.3d 894 (7th Cir. 2003) and *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (greater probative weight may be given to the interpretations of a dual qualified radiologist in comparison to a physician who is only a B reader).

*Medical Opinion*

Although Mr. J. cannot establish the presence of black lung disease through chest x-ray evidence, he may still prove this requisite element of entitlement under 20 C.F.R. § 718.202 (a)(4) through the preponderance of the more probative medical opinion. To better evaluate the diverse medical opinion, a review of the other objective medical evidence in the record is helpful.

Pulmonary Function Tests

| **Exhibit** | **Date / Doctor** | **Age / Height** | **$FEV_1$ pre[26] post[27]** | **FVC pre post** | **MVV pre post** | **% $FEV_1$ / FVC pre post** | **Qualified[28] pre post** | **Comments** |
|---|---|---|---|---|---|---|---|---|
| DX 10 | Sep. 25, 2003<br>Dr. Forehand | 48<br>70" | 4.99 | 6.72 | 139 | 74% | No[29] | |
| EX 1 | Mar. 23, 2005<br>Dr. Castle` | 49<br>71" | 3.95<br>2.33 | 5.41<br>4.80 | 73 | 73%<br>48% | No[30]<br>No | Post test is invalid |

Arterial Blood Gas Studies

| **Exhibit** | **Date / Doctor** | **$_pCO_2$ (rest) $_pCO_2$ (exercise)** | **$_pO_2$ (rest) $_pO_2$ (exercise)** | **Qualified** | **Comments** |
|---|---|---|---|---|---|
| DX 10 | Sep. 25, 2003<br>Dr. Forehand | 29<br>27 | 63<br>78 | Yes[31]<br>No[32] | |
| EX 1 | Mar. 23, 2005<br>Dr. Castle | 26.3 | 72.4 | Yes[33] | Normal with hyperventilation.[34] |

[26]Test result before administration of a bronchodilator.

[27]Test result following administration of a bronchodilator.

[28]Under 20 C.F.R. § 718.204 (b)(2)(i), to qualify for total disability based on pulmonary function tests, for a miner's age and height, the FEV1 must be equal to or less than the value in Appendix B, Table B1 of 20 C.F.R. § 718 (2001), **and either** the FVC has to be equal or less than the value in Table B3, or the MVV has to be equal **or** less than the value in Table B5, or the ratio FEV1/FVC has to be equal to or less than 55%.

[29]The qualifying FEV1 number is 2.22 for age 48 and 70″; the corresponding qualifying FVC and MVV values are 2.79 and 89, respectively.

[30]The qualifying FEV1 number is 2.30 for age 49 and 71″; the corresponding qualifying FVC and MVV values are 2.89 and 92, respectively.

[31]For a $pCO^2$ of 29, the qualifying $pO^2$ is 71, or less.

[32]For a $pCO^2$ of 27, the qualifying $pO^2$ is 73, or less.

[33]For a $pCO^2$ of 26, the qualifying $pO^2$ is 74, or less.

[34]Exercise test not conducted due to Mr. J.'s back condition.

Dr. Ramon A. Motos
(DX 13)

On September 25, 2000, Dr. Motos evaluated Mr. J. for hypertension. Mr. J.'s medical history included "bronchial asthma." Upon physical examination, Mr. J.'s lungs and chest were clear. His blood pressure was 168/100. Having diagnosed hypertension and asthma, Dr. Motos prescribed blood pressure medication. October 18, 2000, in a follow-up evaluation, Mr. J.'s blood pressure had responded to the medication and dropped to 122/84.

On November 12, 2001, Mr. J. saw Dr. Motos for an upper respiratory infection. At that time, his lungs were clear. When Mr. J. returned on November 16, 2002, he reported wheezes and shortness of breath. Dr. Motos heard rhonchi during the chest examination.

On October 7, 2002, Mr. J. presented with complaints of shortness of breath and radiating back pain. Dr. Motos noted Mr. J.'s increasing weight. The chest and lungs were clear. Dr. Motos diagnosed hypertension and shortness of breath probably due to bronchial asthma, although allergies were considered.

On October 21, 2002, Dr. Motos evaluated Mr. J. for back pain and noted that a recent CT scan indicated the presence of degenerative disc disease and bulging disc. Upon physical examination, the lungs were clear.

Between February 14, 2003 and May 18, 2004, Dr. Motos evaluated and treated Mr. J. on eight occasions for hypertension and back pain. During these office visits, Dr. Motos reported that Mr. J.'s chest and lungs were clear. Dr. Motos diagnosed chronic back pain due to degenerative disc disease and herniated disc and hypertension.

Dr. David R. Robins
(DX 13)

Between October 21, 2002 and February 4, 2003, Dr. Robins, a board certified orthopedic surgeon, treated Mr. J. for back pain. Upon initial examination, Dr. Robins noted Mr. J.'s limited range of motion. A CT scan had demonstrated the presence of degenerative disc disease and a herniated disc. Mr. J. indicated that he had injured his back while cleaning up a work area. In November 2002, Dr. Robins determined Mr. J.'s back pain was sufficient to keep him from returning to work. Since Mr. J. was not a viable candidate for surgery, Dr. Robins prescribed physical therapy and weight loss.

Dr. Mario S. Cardona
(DX 13)

On July 11, 2003, Dr. Cardona conducted a pulmonary evaluation, which included Dr. Cappiello's interpretation of chest x-ray. In response to an inquiry from Claimant's counsel, Dr. Cardona indicated that Mr. J. had pneumoconiosis associated with his coal mine employment. Dr. Cardona based his diagnosis on the abnormal chest x-ray and Mr. J.' severe symptoms of shortness of breath, including cough and chest pain. Due to his severe shortness of breath, Mr. J.

had a totally disabling, moderate to severe pulmonary impairment. Since Mr. J.'s work had been in the coal mines, Dr. Cardona concluded pneumoconiosis was the cause of the impairment.

Dr. J. Randolph Forehand
(DX 10 and DX 14)

On September 25, 2003, Dr. Forehand, board certified in pediatrics, allergy and immunology, conducted a pulmonary evaluation. Mr. J. had 28 years of underground mining. He spent his last eight years operating a mucking machine. Mr. J. smoked a half a pack of cigarettes from 1978 to 1982. He complained about long term shortness of breath with any strenuous activity. Upon physical examination, Dr. Forehand heard crackles in both lung bases. The chest x-ray was positive for pneumoconiosis. The pulmonary function test was normal. The arterial blood gas study indicated arterial hypoxemia. Based on the chest x-ray, employment history, physical examination, and arterial blood gas study, Dr. Forehand diagnosed coal workers' pneumoconiosis. Mr. J. also had a significant respiratory impairment which rendered him totally disabled. In Dr. Forehand's opinion, "coal workers' pneumoconiosis is the sole factor contributing to [the] respiratory impairment."

On August 3, 2004, Dr. Forehand indicated that even if the chest x-ray had been negative for pneumoconiosis, he would have still diagnosed coal workers' pneumoconiosis. Dr. Forehand noted that since Mr. J.'s worked 28 years as a miner and driller in dusty locations, he was at increased risk for developing coal workers' pneumoconiosis. The physician also stated that coal workers' pneumoconiosis can cause a disabling respiratory impairment even if it is not radiographically apparent.

Dr. James R. Castle
(EX 1 and EX 2)

On March 23, 2005, Dr. Castle, board certified in pulmonary disease and internal medicine, conducted a pulmonary evaluation of Mr. J. on March 23, 2005. Mr. J. had spent 23 years as a hard rock miner, constructing shafts for coal mines. According to Mr. J., the work involved heavy labor in dusty conditions. Mr. J. had also smoked cigarettes for about 5 years. He weighed 252 pounds. Upon physical examination, the chest was normal. The chest x-ray was negative for pneumoconiosis. The valid, pre-bronchodilator pulmonary function test was normal. The post-bronchodilator test was invalid due to less than maximal effort. The resting arterial blood gas study was normal with hyperventilation. Based on his examination, Dr. Castle opined that Mr. J. did not have coal workers' pneumoconiosis or a respiratory impairment from any source.

Dr. Castle also reviewed the other medical evidence in the case including the radiographic studies and the evaluations and comments by Dr. Forehand and Dr. Cardona. Dr. Castle noted the majority of the chest x-ray evidence was negative and the pulmonary function tests were normal. The abnormal resting arterial blood gas study obtained by Dr. Forehand was due to obesity rather any pulmonary impairment since it improved with exercise. In Dr. Castle's evaluation, the arterial blood gas study was normal with hyperventilation. Based on his medical

record review, Dr. Castle again concluded Mr. J. did not have coal workers' pneumoconiosis or a totally disabling pulmonary impairment.

Discussion

Dr. Robins did not make any pulmonary diagnosis. Similarly, although Mr. J. occasionally presented with shortness of breath and possible bronchial asthma, Dr. Motos did not identify the etiology of those pulmonary ailments. Consequently, his treatment notes do specifically address whether Mr. J. had pneumoconiosis.

In contrast, Dr. Cardona and Dr. Forehand diagnosed pneumoconiosis. On the other hand, Dr. Castle concluded Mr. J. did not have coal workers' pneumoconiosis. Due to this conflict in medical opinion, I must first assess the relative probative value of each respective opinion in terms of documentation, reasoning, and medical qualifications.

Regarding the first probative value consideration, documentation, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter.

The second factor affecting relative probative value, reasoning, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

Third, a physician who is board certified in the field of pulmonary disease and who has extensive experience in this area may be accorded greater deference because of his or her expertise. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

With these principles in mind, I find that Dr. Cardona's diagnosis of pneumoconiosis has diminished probative value for documentary and reasoning shortfalls. In terms of documentation, Dr. Cardona based his finding of clinical pneumoconiosis on the "abnormal" chest x-ray of July 11, 2003. However, upon my consideration of the two competing interpretations of that film, I have determined that the July 11, 2003 chest x-ray is at best inconclusive for the presence of pneumoconiosis. Further, I have concluded the preponderance of the radiographic evidence is actually negative for pneumoconiosis. As a result, the radiographic record does not warrant Dr. Cardona's reliance as a basis for diagnosing clinical pneumoconiosis. Concerning reasoning, when Dr. Cardona diagnosed legal pneumoconiosis by

attributing Mr. J.'s pulmonary impairment to his coal mine employment, the physician cited only Mr. J.'s history of coal mine employment as the basis for the etiology conclusion. Dr. Cardona did not indicate the objective medical evidence that helped him isolate the cause of Mr. J.'s breathing problem to his exposure to coal mine dust. That shortfall is significant considering Dr. Motos' treatment notes raise the possibility that Mr. J. may struggle with bronchial asthma.

In light of his full pulmonary examination, Dr. Forehand rendered a documented opinion. While presented as terse conclusions, and even though I have determined the preponderance of the chest x-ray evidence is actually negative, Dr. Forehand's findings of both clinical and legal pneumoconiosis are minimally reasoned since he based his diagnoses on the totality of his pulmonary evaluation, which besides the chest x-ray included crackles during physical examination of the chest and normal pulmonary function coupled with abnormal blood gas exchange at rest.

Similarly, Dr. Castle also provided a documented and reasoned medical opinion. However, for two factors, I give Dr. Castle's findings that Mr. J. has neither clinical nor legal pneumoconiosis enhanced probative value. First, of all the physicians to treat and evaluate Mr. J. Dr. Castle, as the sole board certified pulmonologist, was best qualified to assess Mr. J.'s pulmonary condition. Second, since he reviewed all the medical evidence in the record, including the treatment notes and Dr. Forehand's pulmonary evaluation, Dr. Castle had the most complete documentary basis upon which to evaluate Mr. J.'s pulmonary health. Based on that more thorough review, and consistent with my determination, Dr. Castle found insufficient radiographic evidence to diagnose clinical pneumoconiosis. Additionally, Dr. Castle noted an improvement in Mr. J.'s arterial blood gas study upon exercise and relied on that objective medical evidence as a basis for finding Mr. J.'s pulmonary problems were due to his weight rather than his exposure to coal dust.

Based on the more probative opinion of Dr. Castle, I find Mr. J. does not have pneumoconiosis.[35] Consequently, Mr. J. is unable to establish the presence of pneumoconiosis through probative medical opinion under 20 C.F.R. § 718.202 (a) (4).

## CONCLUSION

Since under the regulations Mr. J. was miner who was regularly exposed to coal mine dust, the request of Frontier-Kemper to be dismissed as the responsible operator must be denied.

Since the preponderance of the chest x-ray evidence is negative, Mr. J. is unable to establish the presence of pneumoconiosis under 20 C.F.R. § 718.202 (a) (1). Since the more probative medical opinion demonstrates that Mr. J. did not have either clinical or legal pneumoconiosis, Mr. J. is also unable to prove the presence of pneumoconiosis under 20 C.F.R. § 718.202 (a) (4). Accordingly, Mr. J. has failed to prove the first requisite element of

[35]Considering the probative deficiencies of Dr. Cardona's evaluation, even if the medical opinions of Dr. Forehand and Dr. Castle had been of equal probative weight, the professional disagreement between Dr. Forehand and Dr. Castle would place the probative medical opinion in equipoise, precluding Mr. J. from establishing the presence of pneumoconiosis through the preponderance of medical opinion.

entitlement – the presence of pneumoconiosis – and his claim for black lung disability benefits must be denied.[36]

**ORDER**

The request by Frontier-Kemper Constructors, Inc. to be dismissed as the designated responsible operator is **DENIED**. The black lung disability claim of Mr. J. L. J., Jr., is **DENIED**.

**SO ORDERED**:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: August 29, 2006
Washington, DC

**NOTICE OF APPEAL RIGHTS**: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

[36]Since Mr. J. has failed to prove the presence of pneumoconiosis, I need not address the remaining three issues.

**Attachment No. 1**

American Board of Medical Specialties

Certification:

Dr. Enrico J. Cappiello

Certified by the American Board of Radiology in:

Diagnostic Radiology

American Board of Medical Specialties
1007 Church Street, Suite 404
Evanston, IL 60201-5913
Phone Verification: (866) ASK-ABMS
Phone: (847) 491-9091/FAX: (847) 328-3596

HTTP://www.abms.org